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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 BANK OF AMERICA, N.A.,

8 Plaintiff(s),

9 v.

10 ANN LOSEE HOMEOWNERS
11 ASSOCIATION, et al.,

12 Defendant(s).

Case No. 2:16-CV-407 JCM (CWH)

ORDER

13
14 Presently before the court is plaintiff Bank of America, N.A., successor by merger to BAC
15 Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP's ("BANA") motion for
16 summary judgment. (ECF No. 36). Defendant Ann Losee Homeowners' Association (the
17 "HOA") (ECF No. 39) and defendants Arkham, LLC and Arkham XIII, LLC (ECF No. 40) filed
18 responses, to which BANA replied (ECF Nos. 45, 46, respectively).

19 Also before the court is the HOA's motion for summary judgment. (ECF No. 37). BANA
20 filed a response (ECF No. 38), to which the HOA replied (ECF No. 47).

21 **I. Facts**

22 This case involves a dispute over real property located at 2317 Clarington Avenue, North
23 Las Vegas, Nevada (the "property"). On November 21, 2009, Paul Borin obtained a loan from
24 First Option Mortgage in the amount of \$204,355.00, which was secured by a deed of trust
25 recorded on November 30, 2009. (ECF No. 1).

26 The deed of trust was assigned to BANA via an assignment of deed of trust recorded on
27 November 14, 2011. (ECF No. 1).
28

1 On November 19, 2013, defendant Absolute Collection Services, LLC (“ACS”), acting on
2 behalf of the HOA, recorded a notice of delinquent assessment lien, stating an amount due of
3 \$1,668.83. (ECF No. 1). On January 8, 2014, ACS recorded a notice of default and election to
4 sell to satisfy the delinquent assessment lien, stating an amount due of \$2,385.68. (ECF No. 1).

5 On February 3, 2014, BANA requested a ledger from the HOA/ACS identifying the
6 superpriority amount allegedly owed to the HOA. (ECF No. 1). The HOA/ACS provided a ledger
7 dated February 19, 2014, stating a superpriority amount owed of \$2,104.35 and a total owed of
8 \$6,553.45. (ECF No. 1). BANA calculated the superpriority amount to be \$180.00 and tendered
9 that amount to ACS on March 3, 2014, which the HOA allegedly accepted. (ECF No. 1).

10 On April 30, 2014, ACS recorded a notice of trustee’s sale, stating an amount due of
11 \$3,843.76 and scheduling the sale for June 17, 2014. (ECF No. 1). On June 17, 2014, defendant
12 Nevada New Builds, LLC (“NNB”) purchased the property at the foreclosure sale for \$9,000.00.
13 (ECF No. 1). A foreclosure deed in favor of NNB was recorded on June 19, 2014. (ECF No. 1).

14 NNB transferred the property to defendant Janet Garcia (“Garcia”) by a deed of sale
15 recorded on July 23, 2014. (ECF No. 1). Thereafter, Garcia transferred the property to defendant
16 Arkham, LLC (“Arkham”) by quitclaim deed recorded on May 1, 2015. (ECF No. 1).
17 Subsequently, Arkham, LLC transferred the property to defendant Arkham XIII, LLC (“Arkham
18 XIII”) by a grant, bargain, sale deed recorded on May 11, 2015. (ECF No. 1).

19 On February 26, 2016, BANA filed the underlying complaint, alleging four claims of relief:
20 (1) quiet title/declaratory judgment against all defendants; (2) breach of NRS 116.1113 against
21 ACS and the HOA; (3) wrongful foreclosure against ACS and the HOA; and (4) injunctive relief
22 against Arkham XIII. (ECF No. 1).

23 On May 20, 2016, Arkham and Arkham XIII filed a counterclaim against BANA alleging
24 two claims for relief: (1) quiet title; and (2) cancellation of instruments. (ECF No. 26).

25 On December 19, 2016, the court dismissed claims (2) through (4) of BANA’s complaint.
26 (ECF No. 35).

27 In the instant motions, BANA and the HOA both move for summary judgment. (ECF Nos.
28 36, 37). The court will address each as it sees fit.

II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts showing that there is a genuine issue for trial.” *Id.*

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party’s case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*

1 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
2 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
3 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
4 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
5 631 (9th Cir. 1987).

6 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
7 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
8 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
9 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
10 for trial. *See Celotex*, 477 U.S. at 324.

11 At summary judgment, a court’s function is not to weigh the evidence and determine the
12 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*
13 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
14 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
15 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
16 granted. *See id.* at 249–50.

17 **III. Discussion**

18 **A. Judicial Notice**

19 As an initial matter, the court takes judicial notice of the following recorded documents:
20 first deed of trust (ECF No. 36-1); the assignment of deed of trust (ECF No. 36-3); notice of
21 delinquent assessment (ECF No. 36-4); notice of default and election to sell (ECF Nos. 36-5, 36-
22 6); notice of trustee’s sale (ECF No. 36-7); and trustee’s deed upon sale (ECF No. 36-10). *See,*
23 *e.g., United States v. Corinthian Colls.*, 655 F.3d 984, 998–99 (9th Cir. 2011) (holding that a court
24 may take judicial notice of public records if the facts noticed are not subject to reasonable dispute);
25 *Intri-Plex Tech., Inv. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

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1 **B. Deed Recitals¹**

2 Section 116.3116(1) of the Nevada Revised Statutes gives an HOA a lien on its
3 homeowners' residences for unpaid assessments and fines; moreover, NRS 116.3116(2) gives
4 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as
5 “[a] first security interest on the unit recorded before the date on which the assessment sought to
6 be enforced became delinquent.” Nev. Rev. Stat. § 116.3116(2)(b).

7 The statute then carves out a partial exception to subparagraph (2)(b)'s exception for first
8 security interests. *See* Nev. Rev. Stat. § 116.3116(2). In *SFR Investment Pool 1 v. U.S. Bank*, the
9 Nevada Supreme Court provided the following explanation:

10 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,
11 a superpriority piece and a subpriority piece. The superpriority piece, consisting of
12 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement
charges, is “prior to” a first deed of trust. The subpriority piece, consisting of all
other HOA fees or assessments, is subordinate to a first deed of trust.

13 334 P.3d 408, 411 (Nev. 2014) (“*SFR Investments*”).

14 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority
15 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, “NRS 116.3116(2) provides an HOA a true
16 superpriority lien, proper foreclosure of which will extinguish a first deed of trust.” *Id.* at 419; *see*
17 *also* Nev. Rev. Stat. § 116.31162(1) (providing that “the association may foreclose its lien by sale”
18 upon compliance with the statutory notice and timing rules).

19 Subsection (1) of NRS 116.31166 provides that the recitals in a deed made pursuant to
20 NRS 116.31164 of the following are conclusive proof of the matters recited:

- 21 (a) Default, the mailing of the notice of delinquent assessment, and the recording
22 of the notice of default and election to sell;
23 (b) The elapsing of the 90 days; and
24 (c) The giving of notice of sale[.]

25 Nev. Rev. Stat. § 116.31166(1)(a)–(c).² “The ‘conclusive’ recitals concern default, notice, and
26 publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale

27 ¹ The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where
28 otherwise indicated, the references in this order to statutes codified in NRS Chapter 116 are to the
version of the statutes in effect in 2013–14, when the events giving rise to this litigation occurred.

² The statute further provides as follows:

1 as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and
2 give context to NRS 116.31166.” *Shadow Wood Homeowners Assoc. v. N.Y. Cmty. Bancorp., Inc.*,
3 366 P.3d 1105 (Nev. 2016) (“*Shadow Wood*”). Nevertheless, courts retain the equitable authority
4 to consider quiet title actions when a HOA’s foreclosure deed contains statutorily conclusive
5 recitals. *See id.* at 1112.

6 Here, BANA has provided the recorded trustee’s deed upon sale, the recorded notice of
7 delinquent assessment, the recorded notice of default and election to sell, and the recorded notice
8 of trustee’s sale. Pursuant to NRS 116.31166, these recitals in the recorded foreclosure deed are
9 conclusive to the extent that they implicate compliance with NRS 116.31162 through NRS
10 116.31164, which provide the statutory prerequisites of a valid foreclosure. *See id.* at 1112 (“[T]he
11 recitals made conclusive by operation of NRS 116.31166 implicate compliance only with the
12 statutory prerequisites to foreclosure.”). Therefore, pursuant to NRS 116.31166 and the recorded
13 foreclosure deed, the foreclosure sale is valid to the extent that it complied with NRS 116.31162
14 through NRS 116.31164.

15 Importantly, while NRS 116.3116 accords certain deed recitals conclusive effect—*e.g.*,
16 default, notice, and publication of the notice of sale—it does not conclusively, as a matter of law,
17 entitle Arkham XIII to success on its quiet title claim. *See Shadow Wood*, 366 P.3d at 1112
18 (rejecting contention that NRS 116.31166 defeats, as a matter of law, actions to quiet title). Thus,
19 the question remains whether BANA has demonstrated sufficient grounds to justify setting aside
20 the foreclosure sale. *See id.* “When sitting in equity . . . courts must consider the entirety of the
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22 2. Such a deed containing those recitals is conclusive against the unit's
23 former owner, his or her heirs and assigns, and all other persons. The receipt for the
24 purchase money contained in such a deed is sufficient to discharge the purchaser
25 from obligation to see to the proper application of the purchase money.

26 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164
27 vests in the purchaser the title of the unit’s owner without equity or right of
28 redemption.

Nev. Rev. Stat. § 116.31166(2)–(3).

1 circumstances that bear upon the equities. This includes considering the status and actions of all
2 parties involved, including whether an innocent party may be harmed by granting the desired
3 relief.” *Id.*

4 **C. Quiet Title**

5 Under Nevada law, “[a]n action may be brought by any person against another who claims
6 an estate or interest in real property, adverse to the person bringing the action for the purpose of
7 determining such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require
8 any particular elements, but each party must plead and prove his or her own claim to the property
9 in question and a plaintiff’s right to relief therefore depends on superiority of title.” *Chapman v.*
10 *Deutsche Bank Nat’l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (internal quotation marks and
11 citations omitted). Therefore, for plaintiff to succeed on its quiet title action, it needs to show that
12 its claim to the property is superior to all others. *See also Breliant v. Preferred Equities Corp.*,
13 918 P.2d 314, 318 (Nev. 1996) (“In a quiet title action, the burden of proof rests with the plaintiff
14 to prove good title in himself.”).

15 Section 116.3116(1) of the NRS gives an HOA a lien on its homeowners’ residences for
16 unpaid assessments and fines. Nev. Rev. Stat. § 116.3116(1). Moreover, NRS 116.3116(2) gives
17 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as
18 “[a] first security interest on the unit recorded before the date on which the assessment sought to
19 be enforced became delinquent.” Nev. Rev. Stat. § 116.3116(2)(b).

20 The statute then carves out a partial exception to subparagraph (2)(b)’s exception for first
21 security interests. *See* Nev. Rev. Stat. § 116.3116(2). In *SFR Investment Pool 1 v. U.S. Bank*, the
22 Nevada Supreme Court provided the following explanation:

23 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,
24 a superpriority piece and a subpriority piece. The superpriority piece, consisting of
25 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement
charges, is “prior to” a first deed of trust. The subpriority piece, consisting of all
other HOA fees or assessments, is subordinate to a first deed of trust.

26 334 P.3d 408, 411 (Nev. 2014) (“*SFR Investments*”).

27 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority
28 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, “NRS 116.3116(2) provides an HOA a true

1 superpriority lien, proper foreclosure of which will extinguish a first deed of trust.” *Id.* at 419; *see*
2 *also* Nev. Rev. Stat. § 116.31162(1) (providing that “the association may foreclose its lien by sale”
3 upon compliance with the statutory notice and timing rules).

4 ***1. Insufficient Tender***

5 In the instant motion, BANA argues that its March 3rd tender to ACS preserved the
6 sonority of BANA’s deed of trust. (ECF No. 36 at 5). BANA asserts that it calculated the
7 superpriority amount to be \$180.00 and tendered that amount to ACS on March 3, 2014, which
8 the HOA allegedly accepted. (ECF No. 36 at 5–7).

9 The court disagrees. The ledger dated February 19, 2014, stated a superpriority amount
10 owed of \$2,104.35 and a total owed of \$6,553.45. (ECF No. 36-8 at 9–10). BANA did not tender
11 the amount set forth in the notice of default or the amount set forth in the ledger. Rather, BANA
12 tendered a lesser amount, the amount it calculated to be sufficient—specifically, \$180.00.

13 Under NRS 116.31166(1), the holder of a first deed of trust may pay off the superpriority
14 portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest.
15 *See* Nev. Rev. Stat. § 116.31166(1); *see also SFR Investments*, 334 P.3d at 414 (“But as a junior
16 lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security”); *see*
17 *also, e.g., 7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A., et al.*, 979 F. Supp. 2d 1142, 1149
18 (D. Nev. 2013) (“If junior lienholders want to avoid this result, they readily can preserve their
19 security interests by buying out the senior lienholder’s interest.” (citing *Carillo v. Valley Bank of*
20 *Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v. Nicholas Beers Co.*, 611 P.2d 1079, 1083 (Nev.
21 1980))).

22 The superpriority lien portion, however, consists of “the last nine months of unpaid HOA
23 dues ***and maintenance and nuisance-abatement charges***,” while the subpriority piece consists of
24 “all other HOA fees or assessments.” *SFR Investments*, 334 P.3d at 411 (emphasis added); *see*
25 *also 7912 Limbwood Ct. Trust*, 979 F. Supp. 2d at 1150 (“The superpriority lien consists only of
26 unpaid assessments and certain charges specifically identified in § 116.31162.”). BANA tendered
27 \$180.00 based on its calculation of the nine months of unpaid HOA dues, without adequately
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1 accounting for the maintenance and nuisance-abatement charges. Further, BANA fails to explain
2 why it was appropriate to eliminate the other charges calculated in the ledger's superpriority total.

3 BANA merely presumed, without adequate support, that the amount set forth in the notice
4 of default/ledger included more than the superpriority lien portion and that a lesser amount based
5 on BANA's own calculations would be sufficient to preserve its interest in the property. *See*
6 *generally, e.g., Nev. Rev. Stat. § 107.080* (allowing trustee's sale under a deed of trust only when
7 a subordinate interest has failed to make good the deficiency in performance or payment for 35
8 days); *Nev. Rev. Stat. § 40.430* (barring judicially ordered foreclosure sale if the deficiency is
9 made good at least 5 days prior to sale).

10 The notice of default recorded January 8, 2014, set forth an amount due of \$2,385.68 and
11 the February 19, 2014, ledger set forth a superpriority amount due of \$2,104.35. Rather than
12 tendering either amount so as to preserve its interest in the property and then later seeking a refund
13 of any difference, BANA elected to pay a lesser amount (\$180.00) based on its unwarranted
14 assumption that the amount stated in the notice included more than what was due. *See SFR*
15 *Investments*, 334 P.3d at 418 (noting that the deed of trust holder can pay the entire lien amount
16 and then sue for a refund). Had BANA paid the amount set forth in the notice of default
17 (\$2,385.68), the HOA's interest would have been subordinate to the first deed of trust. *See Nev.*
18 *Rev. Stat. § 116.31166(1)*.

19 After failing to use the legal remedies available to BANA to prevent the property from
20 being sold to a third party—for example, seeking a temporary restraining order and preliminary
21 injunction and filling a *lis pendens* on the property (*see Nev. Rev. Stat. §§ 14.010, 40.060*)—
22 BANA now seeks to profit from its own failure to follow the rules set forth in the statutes. *See*
23 *generally, e.g., Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa. 1888) (“In the case
24 before us, we can see no way of giving the petitioner the equitable relief she asks without doing
25 great injustice to other innocent parties who would not have been in a position to be injured by
26 such a decree as she asks if she had applied for relief at an earlier day.”); *Nussbaumer v. Superior*
27 *Court in & for Yuma Cty.*, 489 P.2d 843, 846 (Ariz. 1971) (“Where the complaining party has
28 access to all the facts surrounding the questioned transaction and merely makes a mistake as to the

1 legal consequences of his act, equity should normally not interfere, especially where the rights of
2 third parties might be prejudiced thereby.”).

3 In presuming that an “offer” to pay constitutes a “tender” of payment, BANA cites to *Stone*
4 *Hollow Ave. Trust v. Bank of Am., Nat’l Ass’n*, 382 P.3d 911 (Nev. 2016), for the proposition that
5 an offer to pay the superpriority amount prior to the foreclosure sale preserves the lender’s deed
6 of trust. (ECF No. 36 at 5–8).

7 The *Stone Hollow* court, however, made no such holding. To the contrary, the *Stone*
8 *Hollow* court held that “[w]hen rejection of a tender is unjustified, the tender is effective to
9 discharge the lien.” 382 P.3d at 911. BANA has not set forth any evidence as to a tender in a
10 sufficient amount.

11 Based on the foregoing, BANA has failed to sufficiently establish that it tendered a
12 sufficient amount prior to the foreclosure sale so as to render NNB’s title (and, therefore, Arkham
13 XIII’s title) subject to BANA’s deed of trust.

14 **2. Due Process**

15 BANA argues that the HOA lien statute is facially unconstitutional because it does not
16 mandate notice to deed of trust beneficiaries. (ECF No. 36 at 8–11). BANA further contends that
17 any factual issues concerning actual notice is irrelevant pursuant to *Bourne Valley Court Trust v.*
18 *Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016) (“*Bourne Valley*”). (ECF No. 24 at 8–11).

19 The Ninth Circuit held that NRS 116.3116’s “opt-in” notice scheme, which required a
20 HOA to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively
21 requested notice, facially violated mortgage lenders’ constitutional due process rights. *Bourne*
22 *Valley*, 832 F.3d at 1157–58. The facially unconstitutional provision, as identified in *Bourne*
23 *Valley*, exists in NRS 116.3116(2). *See id.* at 1158. At issue is the “opt-in” provision that
24 unconstitutionally shifts the notice burden to holders of the property interest at risk. *See id.*

25 To state a procedural due process claim, a claimant must allege “(1) a deprivation of a
26 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural
27 protections.” *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.
28 1998). BANA has satisfied the first element as a deed of trust is a property interest under Nevada

1 law. *See* Nev. Rev. Stat. § 107.020 *et seq.*; *see also* *Mennonite Bd. of Missions v. Adams*, 462 U.S.
2 791, 798 (1983) (stating that “a mortgagee possesses a substantial property interest that is
3 significantly affected by a tax sale”). However, BANA fails on the second prong.

4 Due process does not require actual notice. *Jones v. Flowers*, 547 U.S. 220, 226 (2006).
5 Rather, it requires notice “reasonably calculated, under all the circumstances, to apprise interested
6 parties of the pendency of the action and afford them an opportunity to present their objections.”
7 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also* *Bourne Valley*,
8 832 F.3d at 1158.

9 Here, adequate notice was given to the interested parties prior to extinguishing a property
10 right. In fact, BANA acknowledges having received the notice of default. (ECF No. 36-8 at 6
11 (“This letter is in response to your Notice of Default with regard to the HOA assessments
12 purportedly owed on the above described real property.”). As a result, the notice of trustee’s sale
13 was sufficient notice to cure any constitutional defect inherent in NRS 116.3116(2) as it put
14 BANA on notice that its interest was subject to pendency of action and offered all of the required
15 information.

16 **3. Commercial Reasonability**

17 BANA contends that judgment in its favor is appropriate because the sale of the property
18 for 6% of its fair market value is grossly inadequate as a matter of law. (ECF No. 36 at 11–14).
19 BANA further argues that the *Shadow Wood* court adopted the restatement approach, quoting the
20 opinion as holding that “[w]hile gross inadequacy cannot be precisely defined in terms of a specific
21 percentage of fair market value, generally a court is warranted in invalidating a sale where the
22 price is less than 20 percent of fair market value.” (ECF No. 36 at 12) (emphasis omitted).

23 NRS 116.3116 codifies the Uniform Common Interest Ownership Act (“UCIOA”) in
24 Nevada. *See* Nev. Rev. Stat. § 116.001 (“This chapter may be cited as the Uniform Common-
25 Interest Ownership Act”); *see also* *SFR Investments*, 334 P.3d at 410. Numerous courts have
26 interpreted the UCIOA and NRS 116.3116 as imposing a commercial reasonableness standard on
27 foreclosure of association liens.³

28 ³ *See, e.g., Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1229
(D. Nev. 2013) (“[T]he sale for \$10,000 of a Property that was worth \$176,000 in 2004, and which

1 In *Shadow Wood*, the Nevada Supreme Court held that an HOA's foreclosure sale may be
2 set aside under a court's equitable powers notwithstanding any recitals on the foreclosure deed
3 where there is a "grossly inadequate" sales price and "fraud, unfairness, or oppression." 366 P.3d
4 at 1110; *see also Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 184 F. Supp. 3d 853, 857–58
5 (D. Nev. 2016). In other words, "demonstrating that an association sold a property at its
6 foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a
7 showing of fraud, unfairness, or oppression." *Id.* at 1112; *see also Long v. Towne*, 639 P.2d 528,
8 530 (Nev. 1982) ("Mere inadequacy of price is not sufficient to justify setting aside a foreclosure
9 sale, absent a showing of fraud, unfairness or oppression." (citing *Golden v. Tomiyasu*, 387 P.2d
10 989, 995 (Nev. 1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere
11 inadequacy of price, it may be if the price is grossly inadequate and there is "in addition proof of
12 some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy
13 of price" (internal quotation omitted)))).

14 Despite BANA's assertion to the contrary, the *Shadow Wood* court did not adopt the
15 restatement. In fact, nothing in *Shadow Wood* suggests that the Nevada Supreme Court's adopted,
16 or had the intention to adopt, the restatement. *Compare Shadow Wood*, 366 P.3d at 1112–13 (citing
17 the restatement as secondary authority to warrant use of the 20% threshold test for grossly
18 inadequate sales price), *with St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 213 (Nev. 2009)
19 (explicitly adopting § 4.8 of the Restatement in specific circumstances); *Foster v. Costco*
20 *Wholesale Corp.*, 291 P.3d 150, 153 (Nev. 2012) ("[W]e adopt the rule set forth in the Restatement
21 (Third) of Torts: Physical and Emotional Harm section 51."); *Cucinotta v. Deloitte & Touche,*
22 *LLP*, 302 P.3d 1099, 1102 (Nev. 2013) (affirmatively adopting the Restatement (Second) of Torts
23 was probably worth somewhat more than half as much when sold at the foreclosure sale, raises
24 serious doubts as to commercial reasonableness."); *SFR Investments*, 334 P.3d at 418 n.6 (noting
25 bank's argument that purchase at association foreclosure sale was not commercially reasonable);
26 *Thunder Props., Inc. v. Wood*, No. 3:14-cv-00068-RCJ-WGC, 2014 WL 6608836, at *2 (D. Nev.
27 Nov. 19, 2014) (concluding that purchase price of "less than 2% of the amounts of the deed of
28 trust" established commercial unreasonableness "almost conclusively"); *Rainbow Bend*
Homeowners Ass'n v. Wilder, No. 3:13-cv-00007-RCJ-VPC, 2014 WL 132439, at *2 (D. Nev.
Jan. 10, 2014) (deciding case on other grounds but noting that "the purchase of a residential
property free and clear of all encumbrances for the price of delinquent HOA dues would raise
grave doubts as to the commercial reasonableness of the sale under Nevada law"); *Will v. Mill*
Condo. Owners' Ass'n, 848 A.2d 336, 340 (Vt. 2004) (discussing commercial reasonableness
standard and concluding that "the UCIOA does provide for this additional layer of protection").

1 section 592A). Because Nevada courts have not adopted the relevant section(s) of the restatement
2 at issue here, the *Long* test, which requires a showing of fraud, unfairness, or oppression in addition
3 to a grossly inadequate sale price to set aside a foreclosure sale, controls. *See* 639 P.2d at 530.

4 Nevada has not clearly defined what constitutes “unfairness” in determining commercial
5 reasonableness. The few Nevada cases that have discussed commercial reasonableness state,
6 “every aspect of the disposition, including the method, manner, time, place, and terms, must be
7 commercially reasonable.” *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 920 (Nev. 1977).
8 This includes “quality of the publicity, the price obtained at the auction, [and] the number of
9 bidders in attendance.” *Dennison v. Allen Grp. Leasing Corp.*, 871 P.2d 288, 291 (Nev. 1994)
10 (citing *Savage Constr. v. Challenge–Cook*, 714 P.2d 573, 574 (Nev. 1986)).

11 Nevertheless, BANA fails to set forth sufficient evidence to show fraud, unfairness, or
12 oppression so as to justify the setting aside of the foreclosure sale. BANA relies on its repeated
13 assertion that BANA tendered the superpriority amount to show fraud, unfairness, or oppression.
14 However, as the discussed in the previous section, the amount due on the date of BANA’s tender
15 was set forth in the notice of default, specifically, \$2,385.68. Rather than tendering the noticed
16 amount under protest so as to preserve its interest and then later seeking a refund of the difference
17 in dispute, BANA chose not to tender a lesser amount (\$180.00), an amount it calculated to be the
18 superpriority portion.

19 Accordingly, BANA’s commercial reasonability argument fails as a matter of law as it
20 failed to set forth evidence of fraud, unfairness, or oppression. *See, e.g., Nationstar Mortg., LLC*
21 *v. SFR Investments Pool 1, LLC*, No. 70653, 2017 WL 1423938, at *2 n.2 (Nev. App. Apr. 17,
22 2017) (“Sale price alone, however, is never enough to demonstrate that the sale was commercially
23 unreasonable; rather, the party challenging the sale must also make a showing of fraud, unfairness,
24 or oppression that brought about the low sale price.”). Because BANA failed to properly raise any
25 equitable challenges to the foreclosure sale, the court need not address BANA’s arguments
26 regarding Arkham XIII’s status as a bona fide purchaser for value. *See id.* at *3 n.3.

27 . . .

28 . . .

1 **4. Supremacy Clause**

2 BANA argues that the HOA lien statute cannot interfere with the federal mortgage
3 insurance program or extinguish mortgage interests insured by the FHA. (ECF No. 36 at 16–22).

4 The single-family mortgage insurance program allows FHA to insure private loans,
5 expanding the availability of mortgages to low-income individuals wishing to purchase homes.
6 *See Sec’y of Hous. & Urban Dev. v. Sky Meadow Ass’n*, 117 F. Supp. 2d 970, 980–81 (C.D. Cal.
7 2000) (discussing program); *W Wash. & Sandhill Homeowners Ass’n v. Bank of Am., N.A.*, No.
8 2:13-cv-01845-GMN-GWF, 2014 WL 4798565, at *1 n.2 (D. Nev. Sept. 25, 2014) (same). If a
9 borrower under this program defaults, the lender may foreclose on the property, convey title to
10 HUD, and submit an insurance claim. 24 C.F.R. § 203.355. HUD’s property disposition program
11 generates funds to finance the program. *See* 24 C.F.R. § 291.1.

12 Allowing an HOA foreclosure to wipe out a first deed of trust on a federally-insured
13 property thus interferes with the purposes of the FHA insurance program. Specifically, it hinders
14 HUD’s ability to recoup funds from insured properties. As this court previously stated in
15 *SaticoyBayLLC, Series 7342 Tanglewood Park v. SRMOF II 2012-1 Trust*, the court reads the
16 foregoing precedent to indicate that a homeowners’ association foreclosure sale under NRS
17 116.3116 may not extinguish a federally-insured loan. No. 2:13–CV–1199 JCM (VCF), 2015 WL
18 1990076, at *4 (D. Nev. Apr. 30, 2015).

19 However, the instant case is distinguishable from these cases in that, here, FHA is not a
20 named party. Neither the complaint nor the counterclaim seeks to quiet title against FHA. Thus,
21 this argument provides no support for BANA as the outcome of the instant case has no bearing on
22 FHA’s ability to quiet title.

23 **5. Retroactivity**

24 BANA contends that *SFR Investments* should not be applied retroactively to extinguish the
25 first deed of trust. (ECF No. 36 at 22–23).

26 The Nevada Supreme Court has since applied the *SFR Investments* holding in numerous
27 cases that challenged pre-*SFR Investments* foreclosure sales. *See, e.g., Centeno v. Mortg. Elec.*
28 *Registration Sys., Inc.*, No. 64998, 2016 WL 3486378, at *2 (Nev. June 23, 2016); *LN Mgmt. LLC*

1 *Series 8301 Boseck 228 v. Wells Fargo Bank, N.A.*, No. 64495, 2016 WL 1109295, at *1 (Nev.
2 Mar. 18, 2016) (reversing 2013 dismissal of quiet-title action that concluded contrary to *SFR*
3 *Investments*, reasoning that “the district court’s decision was based on an erroneous interpretation
4 of the controlling law”); *Mackensie Family, LLC v. Wells Fargo Bank, N.A.*, No. 65696, 2016 WL
5 315326, at *1 (Nev. Jan. 22, 2016) (reversing and remanding because “[t]he district court’s
6 conclusion of law contradicts our holding in *SFR Investments Pool I v. U.S. Bank*”). Thus, *SFR*
7 *Investments* applies to this case.

8 In light of the foregoing, BANA has failed to show that it is entitled to judgment as a matter
9 of law on its claims against the HOA, ACS, Arkham, and Arkham XIII.

10 **D. The HOA’s Motion for Summary Judgment**

11 The HOA has failed to adequately show that it is entitled to summary judgment on BANA’s
12 quiet title claim. (ECF No. 37). In particular, the HOA admits accepting BANA’s March 3rd
13 tender of \$180.00, but argues that BANA merely tendered a partial lien payment to the HOA,
14 which encompassed nine months of delinquent assessments. (ECF No. 39 at 5). The HOA fails
15 to explain whether it accepted BANA’s tender as a partial payment on the entire lien or as payment
16 of the superpriority portion of the lien. Thus, a genuine dispute exists as to whether the HOA
17 accepted BANA’s tender as satisfying the superpriority amount.

18 Accordingly, the HOA’s motion for summary judgment will be denied.

19 **IV. Conclusion**

20 Accordingly,

21 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that BANA’s motion for
22 summary judgment (ECF No. 36) be, and the same hereby is, DENIED.

23 IT IS FURTHER ORDERED that the HOA’s motion for summary judgment (ECF No. 37)
24 be, and the same hereby is, DENIED.

25 DATED May 18, 2017.

26 
27 _____
UNITED STATES DISTRICT JUDGE